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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of Section 73.202(b))
Table of Allotments) MB Docket No. 04-411
FM Broadcast Stations) RM - 11096
(Georgetown, Mason, Oxford and)
West Union, Ohio, and Salt Lick, Kentucky)

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To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

Federal Communications Commission
Office of Secretary

**REPLY COMMENTS AND MOTION TO
DISMISS COUNTERPROPOSAL**

First Broadcasting Capital Partners, LLC ("First Broadcasting"), licensee of Stations WOXY(FM), Oxford, Ohio, and WAXZ(FM), Georgetown, Ohio, and Dreamcatcher Communications, Inc. ("Dreamcatcher"), licensee of Station WRAC(FM), West Union, Ohio (collectively, the "Petitioners"), by their respective counsel, hereby submit their Reply Comments and Motion to Dismiss directed to the Counterproposal filed by Gateway Radio Works, Inc. ("Gateway") on December 27, 2004 and the Comments filed by Bradlee J. Beer ("Beer"). Gateway's Counterproposal is defective because, among other things, parties are prohibited from utilizing the Commission's reclassification procedures for Class C stations at the counterproposal stage of a rule making proceeding. See 47 C.F.R. § 1.420(g), n. 2. In support hereof, Petitioners state as follows:

I. GATEWAY'S COUNTERPROPOSAL

1. In its Counterproposal, Gateway proposes to (i) allot Channel 249A to Livingston, Kentucky, which requires the downgrade of Station WJXB-FM, Knoxville, Tennessee, and (ii) change the community of license of Station WIVY(FM) (Channel 242A) from Morehead,

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Kentucky to Salt Lick, Kentucky. Gateway claims that this "Counterproposal is mutually exclusive with Joint Petitioners' Allotment Plan." Counterproposal at ¶ 2. However, Gateway's proposal to change the community of license of Station WIVY(FM) from Morehead to Salt Lick is not mutually exclusive with Petitioners' proposal and is not required by Gateway's proposal to allot Channel 249A at Livingston. See Counterproposal, Technical Report, Exhibit E4. It is an independent proposal that can be addressed by the Commission separately irrespective of the outcome of this proceeding.

2. It is well established under Commission precedent that "a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931, n.5 (1990); see *Indian Springs, Nevada, et. al.*, 14 FCC Rcd 10568, ¶ 14 (1999). Therefore, because Gateway's proposal to change the community of license of Station WIVY(FM) from Morehead to Salt Lick is not mutually exclusive with any proposal in this proceeding, as a matter of law, it must be dismissed from this proceeding. *Id.*

3. This leaves Gateway's proposal to allot Channel 249A at Livingston, which requires Station WJXB-FM, Knoxville, Tennessee to be downgraded from Channel 248C to Channel 248C0. See Counterproposal at ¶ 4. In order to downgrade WJXB-FM, without the licensee's consent Gateway must invoke the Commission's reclassification procedures and the Commission would have to issue an Order to Show Cause to the licensee of Station WJXB-FM. See 47 C.F.R. § 1.420(g), n. 2. However, it is well established under Commission rule and precedent that this reclassification procedure is **not** available to a party filing a counterproposal. *1998 Biennial Regulatory Review-Streamlining of Technical Rules in Parts 73 and 74 of the*

Commission's Rules, 15 FCC Rcd 21649, ¶ 28 (2000) (“*Biennial Review*”); and *Fort Collins, Colorado, et al.*, 19 FCC Rcd 15317, ¶ 5, *app. for review pending* (2004). In *Biennial Review*, the Commission expressly stated that “reclassification may be initiated only through an original petition for rule making to amend the FM Table of Allotments, and not through comments or counterproposals.” *Id.* at ¶ 28. Therefore, Gateway’s proposal to allot Channel 249A at Livingston cannot be considered in this proceeding and, as a matter of law, must be dismissed.

4. In addition to its Counterproposal, Gateway raises a point concerning Dreamcatcher’s proposal to change the community of license of Station WRAC(FM) from West Union, Ohio to Georgetown, Ohio. Specifically, Gateway claims that moving WRAC(FM) to Georgetown will leave West Union without local service. *See* Counterproposal at ¶ 6. However, Dreamcatcher’s proposal would not leave West Union without local service because Station WVXW(FM) is licensed to West Union. Gateway acknowledges this but claims that, because WVXW(FM) is a “satellite” of Station WVXU(FM), Cincinnati, Ohio, it should not be considered a local service at West Union. This claim is without merit, and Gateway cites no rule, policy, or case to support its conclusion.

5. Station WVXW(FM) is classified as a “satellite” station because it has been granted a waiver of the Commission’s main studio rule. However, it is established Commission policy that “satellite” stations are required to meet all local service obligations, including local programming obligations and public file requirements. *Review of Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691 (1998), *recon. granted in part*, 14 FCC Rcd 11113 (1999); *see Delmarva Educational Association For a New FM Broadcast Station at Cheriton*, 19 FCC Rcd 6793, ¶ 11 (2004); *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Jeffrey*

D. Southmayd, Esq., counsel to the Moody Bible Institute of Chicago (December 10, 2002). Therefore, contrary to Gateway's claim, West Union will not be deprived of local service if Petitioners' proposal to change the community of license of Station WRAC(FM) from West Union to Georgetown is granted because West Union will continue to be served by Station WVXW(FM).

6. Gateway's proposals to allot Channel 249A at Livingston, Kentucky, and to change the community of license of Station WIVY(FM) from Morehead to Salt Lick each violate the Commission's requirements for counterproposals. Therefore, Gateway's entire Counterproposal is defective and should be dismissed.

II. BEER'S COMMENTS

7. In his Comments, Beer asserts that First Broadcasting's proposal to change the community of license of Station WOXY(FM) from Oxford, Ohio to Mason, Ohio is not in the public interest because the community of Oxford will be left with local service from non-commercial educational Station WMUB(FM). Beer, however, fails to acknowledge that First Broadcasting will be providing the community of Mason with a first local service under priority 3, which is a higher priority than the retention of a second local service at Oxford under priority 4. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). And, while service at Oxford will be maintained by a noncommercial educational station, the Commission does not make a distinction between the type of service retained. Specifically, in *Crisfield, Maryland, et. al.*, the Commission held that "noncommercial stations are relevant for purposes of analyzing local service to a community under Section 307(b) of the Act, and all noncommercial educational stations have an obligation to serve significant programming needs of their communities" 18 FCC Rcd 19561, ¶ 19 (2003), *recon. granted in part*, 19 FCC Rcd 14612 (2004). Further, the Commission routinely grants proposals where local service is maintained by

a noncommercial educational station. *See Freer, Hebbbronville, and Orange Grove, Texas*, 19 FCC Rcd 4742 (2004); *Crisfield, MD* 18 FCC Rcd 19561. Therefore, contrary to Beer's claim First Broadcasting's proposal does serve the public interest.

8. Beer also claims that First Broadcasting's proposal is not in the public interest because Station WOXY(FM) is moving to Mason which is a "suburb" of Cincinnati. However, the Commission has an established procedure to evaluate the migration of stations from rural to urban areas. *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*"). Here, the Commission has evaluated First Broadcasting's proposal under *Tuck* and held that "Mason is sufficiently independent of the Cincinnati Urbanized Area to warrant a first local preference." *See NPRM* at ¶ 4. Beer does not provide any evidence to the contrary and, in fact, states that the evidence provided by First Broadcasting is true. *See Comments* at ¶ 3. Therefore, again, Beer has failed to demonstrate that First Broadcasting's proposal does not serve the public interest.

III. CONCLUSION

9. In the *NPRM* issued in this proceeding, the Commission found that Petitioners' proposal was technically correct and served the public interest. Thus, the Commission proposed to grant Petitioner's proposal after it had accepted comments and counterproposals. As demonstrated above, the only counterproposal filed was technically defective and must be dismissed, and the comments filed are either legally meritless or fail to demonstrate that Petitioners' proposal will not serve the public interest. Therefore, the Commission should grant Petitioner's proposal as stated in the *NPRM*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that on this 11th day of January, 2005, I caused copies of the foregoing "**Reply Comments and Motion to Dismiss**" to be mailed, first class postage prepaid, or hand delivered, addressed to the following persons:

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